LIBRARY
SUPREME COURT U.S.

Office Supreme Court, U.S.
FILED
SEP 13 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 415

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

SUBJECT INDEX

PAGE

Opinions below 1

Grounds on which the jurisdiction of this court is invoked 2

Questions presented for review 2

Constitutional provisions and statutes which the case involves 4

Statement of the case 4

Reasons for allowing of the writ and argument amplifying same 7

I

The Court of Appeals' decision is in conflict with decisions of other courts of appeal on the same matter 7

A.

On the issue as to whether military service by reason of conscription raises a rebuttable presumption and is sufficient to establish prima facie that the service was involuntary 7

B.

On the issue as to whether the burden is upon the Government to prove that the military service was voluntary 8

C.

The decision below is contrary to the decisions, including the very ones upon which the court below relied, of other circuits which, on substantially the same facts, have held the military service to be not voluntary and hence not expatriating 10

D.

As to whether it can be held that compulsory military service due to conscription is voluntary, premised upon acts of omission rather than commission 13

PAGE

I.

As to whether the statute should be construed so as to make expatriating conduct which is in obedience to the laws of a foreign country by one present in that country 15

F.

As to whether 8 USC 801(e) is unconstitutional 15

G.

As to whether the finding by the trial court, approved by the court below, that petitioner's military service was voluntary, is clearly erroneous within the meaning of Rule 52(a), Federal Rules of Civil Procedure 16

II.

The decision of the court below has decided an important question of federal law which has not been, but should be, decided by this court 19

III.

The court below has decided questions of federal law in conflict with applicable decisions of this court 22

A.

The decision below is in conflict with this court's decision in Gonzales v. Landon, 350 U. S. 920, in holding that the standard of proof required in cases arising under Section 401(e) of the Nationality Act of 1940 is different from that required under 401(j) and in the denaturalization cases 22

B.

The decision below is in conflict with decisions of this court which have held that conduct under compulsion of law is not voluntary 23

PAGE

C.

The decision below is in conflict with decisions of this court which held that conduct pursuant to law by a United States citizen in a foreign country of which he is also a citizen should not be held to be expatriating ... 25

D.

If Section 401(c) is not construed so as to preclude loss of citizenship under the circumstances of this case, it is unconstitutional in violation of the due process clause of the Fifth Amendment and the citizenship clause of the Fourteenth Amendment ... 26

IV.

The decision of the court below is clearly erroneous ... 27

Conclusion ... 27

Appendices:

Appendix A. Opinion of the United States Court of Appeals ... App. p. 1

Appendix B. Judgment of the United States Court of Appeals ... App. p. 14

TABLE OF AUTHORITIES CITED

Cases	Page
Acheson v. Maenza, 202 F. 2d 453	6, 10, 11, 13, 16
Acheson v. Murata, 342 U. S. 900	19, 20
Acheson v. Okimura, 342 U. S. 899	19, 20
Adams v. Maryland, 347 U. S. 179	24
Alata v. Dulles, 221 F. 2d 52	10, 14, 16
Angello v. Dulles, 220 F. 2d 344	8, 9, 10, 11, 12, 24
Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274	6
Baumgartner v. United States, 332 U. S. 665	27
Beyce v. Dulles, 226 F. 2d 265	12
Cassell v. Texas, 339 U. S. 282	27
Cudahy Packing Co. v. Holland, 315 U. S. 357	24
Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187	6
DeMarco v. Dulles, 226 F. 2d 265	12
Dorean v. Marshall, 170 F. 2d 721	9
Dos Reis ex rel. Camara v. Nicolls, 161 F. 2d 800	16, 23
Fukumoto v. Dulles, 216 F. 2d 553	6
Gibson v. United States, 329 U. S. 338	24
Gonzales v. Landon, 350 U. S. 920	18, 19, 20, 21, 22, 23, 26, 27
Kanno v. Acheson, 92 F. Supp. 183	5
Kato v. Acheson, 94 F. Supp. 415	5, 21
Kawakita v. United States, 343 U. S. 717, 206 F. 2d 598	15, 24, 25
Lehmann v. Acheson, 206 F. 2d 592	7, 9, 10, 13, 14, 15, 24
Mackenzie v. Hare, 239 U. S. 299	15, 26
Mandoli v. Acheson, 344 U. S. 133	13, 14, 23, 24, 26
Mendelsohn v. Dulles, 207 F. 2d 37	13
Monaco v. Dulles, 210 F. 2d 760	11, 14, 17
Murata v. Acheson, 99 F. Supp. 591	19
Niemetko v. Maryland, 340 U. S. 268	27
Okimura v. Acheson, 99 F. Supp. 587	19
Osborn v. Bank of the United States, 9 Wheat. (U. S.) 738	26

	PAGE
Oyama v. California, 332 U. S. 633	17, 27
Pandolfo v. Acheson, 202 F. 2d 38	8, 10, 14, 16
Perez v. Brownell, No. 14,497 F. 2d , 25 L. W. 2057	21
Perkins v. Elg, 307 U. S. 325	9, 23
Perri v. Dulles, 206 F. 2d 586	7, 10, 11, 14
Podea v. Acheson, 179 F. 2d 306	11
Santi v. Dulles, 226 F. 2d 206	12
Schioler v. Secretary of State, 175 F. 2d 402	9
Schneiderman v. United States, 320 U. S. 118	27
Soccodato v. Dulles, 226 F. 2d 243	11, 14, 17
Sparrow v. Strong, 3 Wall. (U. S.) 97, 18 L. Ed. 49	6
Stipa v. Dulles, 233 F. 2d 551	9, 10, 17
Terada v. Dulles, 121 F. Supp. 6	20
The Apollon, 9 Wheat. (U. S.) 362, 6 L. Ed. 111	6
United States v. DiRe, 332 U. S. 581	24
United States v. Wong Kim Ark, 169 U. S. 649	26
United States ex rel. Schachter v. Curran, 4 F. 2d 356	18
Weber v. United States, 315 U. S. 787	24
Wieman v. Updegraff, 344 U. S. 183	21
Yasui v. United States, 320 U. S. 115	26
Young v. United States, 315 U. S. 257	24

RULES

Federal Rules of Civil Procedure, Rule 52(a)	17

STATUTES

Immigration and Nationality Act of 1952, Sec. 405(a)	6
Nationality Act of 1940, Sec. 401(c)	2, 3, 4, 15, 19, 20, 22
Nationality Act of 1940, Sec. 401(d)	20
Nationality Act of 1940, Sec. 401(j)	3, 19, 22
Nationality Act of 1940, Sec. 503	6
15 Statutes at Large, p. 223	20

	Page
54 Statutes at Large, p. 1137	3
54 Statutes at Large, p. 1168	2, 4
54 Statutes at Large, p. 1171	6
66 Statutes at Large, p. 280	6
United States Code, Title 8, Sec. 801 (e)	2, 4, 15
United States Code, Title 8, Sec. 801 (g)	21
United States Code, Title 8, Sec. 801 (j)	3, 21
United States Code, Title 8, Sec. 903	6
United States Code, Title 8, Sec. 1101	6
United States Code, Title 8, Sec. 1254 (a) (3)	2
United States Code, Title 8, Sec. 1481	21
United States Code, Title 8, Sec. 1482	20, 21
United States Code, Title 8, Sec. 1483	20
United States Code, Title 8, Sec. 1503	6
United States Code, Title 28, Sec. 1252	19
United States Code, Title 28, Sec. 1254 (1)	2
United States Constitution, Fifth Amendment	3, 4
United States Constitution, Fourteenth Amendment, Sec. 1	3, 4
United States Revised Statutes, Sec. 1999	20

TEXTBOOKS

63 Harvard Law Review, p. 13, McElwain, The Business of the Supreme Court as Conducted by Chief Justice Hughes	27
41 Opinions of the Attorney General, No. 19	13
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1951 Ed.), p. 666	24
64 Yale Law Journal, pp. 1164, 1171, The Expatriation Act of 1954	21

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Mitsugi Nishikawa, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming a judgment of the United States District Court for the Southern District of California.

Opinions Below.

No opinion was written by the trial court.

The opinion of the court below [R. 66-75] is not yet reported. It is set forth hereinafter as Appendix "A." The judgment of the court below [R. 76] is set forth hereinafter as Appendix "B."

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed is June 18, 1956 [R. 76] and the time of its entry is the same [R. 65].

2. No rehearing was requested nor was any extension of time within which to petition for certiorari requested.

3. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 USC 1254(1).

Questions Presented for Review.

1. Should Section 401(c) of the Nationality Act of 1940 (54 Stat. 1168; 8 USC 801(c))[1] be so interpreted as to impose compulsory loss of citizenship upon a native born United States citizen under the facts of this case—namely: obedience to the compulsory military conscription laws of Japan by a United States citizen temporarily residing in that country, he also, under the laws of that country, having the nationality thereof; or should the statute, in order to avoid a grave constitutional question, be so interpreted as not to impose loss of citizenship on one who, while in a foreign country and subject to the laws thereof, obeys the laws of that country?

2. If the answer to question 1 is that 8 USC 801(c) is to be so interpreted as to impose loss of citizenship under such facts, is the statute unconstitutional, on its face and as applied in this case, under the citizenship clause

[1] Now covered by 8 USC 1254(a)(3).

of the 14th Amendment and, or under the due process clause of the 5th Amendment?

3. In expatriation cases arising under Section 401(c) of the Nationality Act of 1940, is the same standard of proof required as in denaturalization cases and as in cases arising under Section 401(j) (54 Stat. 1137, 8 USC 801(j))?

4. Upon whom is the burden of proving the nature of the conduct under Section 401(c)—the Government to show that the conduct was voluntary, or the citizen to show that the conduct was involuntary?

5. Where the military service referred to in Section 401(c) of the Nationality Act of 1940, is pursuant and in obedience to the compulsory military conscription law of the foreign country, does a rebuttable presumption arise that such service is involuntary?

6. Irrespective of where the burden of proof may lie in an expatriation case arising under Section 401(c) of the Nationality Act of 1940,—whether that burden be upon the Government to show, by clear, convincing and unambiguous evidence, that the military service was voluntary, or it be upon the Government to overcome the presumption of involuntary conduct which arose by reason of the fact that petitioner's military service was pursuant to his being drafted under the compulsory Japanese Military Service Law, or whether it be upon petitioner to show that his service was involuntary, was appellant's military service in Japan voluntary so that, constitutional and interpretation questions aside, he is to be held to have lost his United States nationality?

Constitutional Provisions and Statutes Which the Case Involves.

Section 401(c) of the Nationality Act of 1940 (54 Stat. 1168; 8 USC 801(c)):

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> ". . .
>
> "(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state";

Section 1 of the 14th Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ."

Fifth Amendment to the United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; . . ."

Statement of the Case.

Petitioner was born in California on April 20, 1916 [R. 10]. He was by United States law (14th Amendment) and by Japanese law [R. 34] a citizen of both countries by birth. Until he went to Japan in August, 1939 [R. 18], petitioner lived all of his life in the United States and was educated in the schools in the United States [R. 18]. In 1939 petitioner went to Japan in

order to visit and study, intending to remain between two to five years [R. 26]. His mother and father remained in the United States [R. 29, 30]. He travelled on an American, not a Japanese, passport [R. 39-40].

When he got to Japan, petitioner started to study under a tutor in Japanese language [R. 35]; he not being able to read Japanese characters [R. 29], but when his father died in November, 1939 [R. 35], he had no funds and so had to go to work (*Ibid.*). Around June, 1940, pursuant to the Japanese compulsory military conscription law [R. 22, 23] he was required to take a physical examination [R. 18] and on March 1, 1941, pursuant to the same law, he was drafted into the army (*Ibid.*). Under the Japanese Military Service Law, service by petitioner was compulsory [R. 23] and said law provided for criminal punishment for evasion thereof (*Ibid.*).

When he received the notices to report for physical examination and to report for induction, petitioner was afraid not to comply because he heard rumors that the Kempei Tei[2] would throw persons who tried to dodge the draft into prison [R. 37], or beat them [R. 47] and he even heard of one case of a boy who was bayoneted by them and killed [R. 37].

At the time here involved, the government of Japan was tyrannical and despotic, with the military controlling

---

[2]The Kempei Tei were the dreaded Japanese military police which held the people in Japan generally in fear. See *Kanno v. Acheson*, 92 F. Supp. 183, 184 (DC SD Cal. 1950); *Kato v. Acheson*, 94 F. Supp. 415, 416 (DC SD Cal. 1950).

the country. Even high officials were killed in their homes [R. 37]. The police made monthly checks of the boarding house where petitioner lived [R. 44].[3] The well known ruthlessness of the regime in power in Japan during this time is a matter of such general public history that this Court can take judicial notice thereof.[4] It was under these circumstances that petitioner obeyed the Japanese law.[5]

Petitioner was discharged from service at the end of the war [R. 19].

After the war, petitioner was denied a passport to return to the United States by the American Consulate at Yokohama on the ground that he had lost his United States citizenship by reason of his service in the Japanese Army [R. 12]. Hence this lawsuit.

The Government introduced no evidence [R. 49, 50].

The District Court had jurisdiction under Section 503 of the Nationality Act of 1940 (54 Stat. 1171; 8 USC 903).[6]

---

[3] Cf. Page 3, Murayama deposition in *Fukumoto v. Dulles*, 216 F. 2d 558, detailing the surveillance under which Nisei (first generation American-born persons of Japanese ancestry) were kept by the police.

[4] *Bank of Augusta v. Earle*, 13 Pet. (US) 519, 590, 591, 10 L. ed. 274, 304; *Sfarroco v. Strong*, 3 Wall. (US) 97, 18 L. ed. 49, 50; *Daniels v. Tearney*, 102 U.S. 415, 26 L. ed. 187, 188; *The Apollon*, 9 Wheat. (US) 362, 374, 6 L. ed. 111, 114.

[5] Cf. *Acheson v. Maenza*, 202 F. 2d 453, 459 (CA DC 1953).

[6] Now covered by 8 USC 1503 and preserved by the Savings Clause of the Immigration and Nationality Act of 1952 (Sec. 405(a) thereof [66 Stat. 280]; note to 8 USC 1101).

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

The Court of Appeals' Decision Is in Conflict With Decisions of Other Courts of Appeal on the Same Matter:

A.

On the Issue as to Whether Military Service by Reason of Conscription Raises a Rebuttable Presumption and Is Sufficient to Establish Prima Facie That the Service Was Involuntary.

The court below held the law to be that [R. 8]:

> "There is no presumption that one who is conscripted into the armed forces enters involuntarily . . ."

This is in direct conflict with the decisions of the Third Circuit.

In *Lehmann v. Acheson*, 206 F. 2d 592, 594 (CA 3 1953), the court said:

> "Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish *prima facie* that his entry and service were involuntary . . ."

That court ruled the same way in *Perri v. Dulles*, 206 F. 2d 586, 589 (CA 3 1953).

And on facts and a record indistinguishable from that here, except that here the facts are stronger from the standpoint of petitioner because the events took place in tyrannical, militaristic, despotic Japan, while in *Lehmann* they took place in democratic Switzerland, the Third Circuit held (206 F. 2d at 594):

> "Upon consideration of the record we are of the opinion that the District Court erred in its determination that Lehmann had expatriated himself from United States citizenship. The Government has failed to rebut the presumption that his entry and service in the Swiss Army as a result of his conscription were involuntary."

The decision below is likewise contrary to that of the Second Circuit in *Augello v. Dulles*, 220 F. 2d 344, 347 (CA 2 1955) where the court held that:

> "the fact of the plaintiff's conscription into the Italian army was sufficient proof of duress to preclude a finding that his consequent taking of the oath was voluntary."

B.

On the Issue as to Whether the Burden Is Upon the Government to Prove That the Military Service Was Voluntary.

The court below held [R. 73] that:

> "the burden (is cast) upon the plaintiff to show that his entry into the armed forces was involuntary."

In so doing, the court below, while acknowledging [R. 71] "that the act of expatriation must be a voluntary act on the part of the plaintiff in order to effect an expatriation," and while approving language in *Pandolfo v. Acheson* (CA 2 1953), 202 F. 2d 38, 40 that "the Government . . . had the burden of showing that he had expatriated himself," disregarded the fact that the voluntary aspect of the case is just as much a part of the Government's case as any other, for "the very essence of expatriation is that it be voluntary." (*Dorcau v.*

Marshall, 170 F. 2d 721, 723 (CA 3 1948).[3] If there can be no expatriation *unless* the act is voluntary, and if the Government has the burden of proving expatriation, the Government must perforce, prove that the act is voluntary, and by the same heavy quantum of proof as any other element, for without such proof, there is no expatriation.

In failing to apply this principle, the decision below is in conflict with decisions of the Second, Third and Seventh Circuits.

In *Lehmann v. Acheson*, 206 F. 2d 592, 598 (CA 3 1953), the court said:

> "It was the District Court's view that Lehmann bore the burden of establishing that his service in the Swiss Army and his taking of an oath of allegiance to Switzerland were involuntary. In that respect the District Court erred. . . ."

Accord:

Angello v. Dulles, 220 F. 2d 344, 345 (CA 3 1955);

Stipa v. Dulles, 233 F. 2d 551, 556 (CA 3 1956);

Schioler v. Secretary of State, 175 F. 2d 402, 403 (CA 7 1949).

[3] As will be seen *infra*, pg. 23, this Court has held to the same effect in *Perkins v. Elg*, 307 U. S. 325, 334: "expatriation is the *voluntary* renunciation or abandonment of nationality and allegiance." (Italics added.)

C.

The Decision Below Is Contrary to the Decisions, Including the Very Ones Upon Which the Court Below Relied, of Other Circuits Which, on Substantially the Same Facts, Have Held the Military Service to Be Not Voluntary and Hence Not Expatriating.

The decisions of the Second and Third Circuits in *Lehmann*, *Perri*, *Stipa* and *Augello* have already been mentioned.

The court below relied upon three cases [R. 72, 73] two from the District of Columbia (*Alata v. Dulles*, 221 F. 2d 52 and *Acheson v. Maenza*, 202 F. 2d 453) and one from the Second Circuit (*Pandolfo v. Acheson*, 202 F. 2d 38).

In the first place, it is at once seen that all three cases held for the citizen and against the Government. This fact is especially persuasive as to the *Alata* case, where the Court of Appeals reversed the trial court in the face of a finding of voluntary conduct. The facts in all three are essentially the same as in the instant case. In other words, had the case at bar arisen in the Second Circuit or in the District of Columbia, it seems certain that the decision would be contrary to that of the court below.

Secondly, as to the *Pandolfo* case from the Second Circuit, it is manifest from a reading of the later *Augello* case, that that circuit did not interpret its earlier *Pandolfo* case as did the court below interpret it. Thus after citing (220 F. 2d at 345) the *Pandolfo* case for the proposition that "on the issue of expatriation the burden of proof was on the defendant," the court reversed the judgment, based, as here, on a finding of voluntary con-

duct, with a direction to grant the declaration sought, because (220 F. 2d at 347):

> "on the issue of duress the fact of the plaintiff's conscription was disregarded. And since there was no evidence to rebut the inference of duress flowing from the plaintiff's status as a conscript there is no need to remand for further findings."

Thus it is clear, not only from the above analysis, but also from the heavy reliance the court in the *Angelio* case placed (220 F. 2d at 346) upon the Third Circuit's decisions in *Perri* and *Lehmann*, that the Second Circuit's view of the law in this type of case is the same as that of the Third Circuit, and, consequently, in conflict with that of the decision below.

Other cases from the Second Circuit demonstrating the conflict between the decision below and those of that Circuit are *Monaco v. Dulles*, 210 F. 2d 760 (CA 2 1954) and *Podea v. Acheson*, 179 F. 2d 306 (CA 2 1950).

As to the two cases from the District of Columbia (*Alata* and *Macuza*) upon which the court below relied, in addition to their being substantially the same, factually, as the case at bar, and hence in conflict with the decision below, a consideration of later District of Columbia cases demonstrates that the concept as to when that court will permit compulsory imposition of loss of citizenship in a case of this type is entirely at odds with the court below. A reading of these cases demonstrates that the District of Columbia is now in accord with the Third Circuit as to the effect of conscription and that that court also considers the Second Circuit to be likewise in line. Thus, in *Soccodato v. Dulles*, 226 F. 2d 243, 246, 247 (CA DC

1955), the court, in discussing and agreeing with the Second Circuit's *Angello* case said:

> "... The appellate court held that the presumption of voluntariness may be rebutted by proof that the oath was taken as an incident of compulsory military service, citing Perri v. Dulles, *supra*, as well as Mandoli v. Acheson, *supra*."

And then, further demonstrating the conflict between the District of Columbia and the decision below, the court said (footnotes omitted):

> "Whether stated in terms of resolving factual doubts in favor of citizenship, as in Alata v. Dulles, or in terms of the necessity of proving expatriation by clear, unequivocal and convincing evidence, as in Monaco v. Dulles, we must keep these criteria in mind when reviewing findings of a trial judge in expatriation cases. . . . Guided by the criteria referred to, considered with this interpretation of 'clearly erroneous,' we . . . are impelled to set aside the conclusion reached by the learned trial judge, *the more so because of uncertainty that the criteria set forth were known to apply in this jurisdiction when the case was before him.*" (Italics added.)

In accord from the District of Columbia are these further cases, all reversing trial courts which had ruled that the conduct was voluntary:

DeMarco v. Dulles, 226 F. 2d 265 (CA DC 1955);

Becce v. Dulles, 226 F. 2d 265 (CA DC 1955) (two cases);

Santi v. Dulles, 226 F. 2d 266 (CA DC 1955).

Contrary to the District of Columbia's holding that it would not adopt "a Spartan standard by which to deter-

mine whether the appellant acted voluntarily." (*Mandel-sohn v. Dulles*, 207 F. 2d 37, 39 (CA DC 1953), and that "the law does not exact a crown of martyrdom as a condition of retaining citizenship." (*Acheson v. Maenza*, 202 F. 2d 453, 459), the court below did adopt such a standard and did exact such a crown.

It is appropriate at this point to call attention to 41 Opinions of the Attorney General No. 16.[8] In that opinion the Attorney General enunciated principles clearly inconsistent with the position of the Government in the instant case.

D.

As to Whether It Can Be Held That Compulsory Military Service Due to Conscription Is Voluntary, Premised Upon Acts of Omission Rather Than Commission.

It is clear that the court below [R. 78], agreed with the trial court that it was proper to hold petitioner's military service to have been voluntary based not on what he *did* do, but on what he *did not* do.[9]

In so doing, the decision below is in conflict with those of the Second, Third and the District of Columbia Circuits.

---

[8] Approved by this Court in *Mandel v. Acheson*, 344 U.S. 133, 138 and commented upon by the Third Court in the *Lehman* case, 206 F. 2d at 500.

[9] He: did not go to the American Consulate and tell them that he did not want to serve in the Japanese Army [R. 68]; did not tell any Japanese official that he was an American citizen [R. 68] (there is no showing in the record that the Japanese officials did not know this fact; it is to be assumed they did); did not make an effort to renounce his Japanese nationality [R. 68] (there is nothing in the record to show that there was any provision in Japanese law permitting such a thing or that, if there was, petitioner knew about it); did not protest against induction in the army or the taking of the physical examination [R. 68].

In *Lehmann v. Acheson*, 206 F. 2d 502, 506, the Third Circuit said:

> "An analysis of the District Court's opinion discloses that its determination was premised on acts of omission, rather than commission, on the part of Lehmann with respect to his service in the Swiss Army and attending circumstances.
>
> . . . . . .
>
> "With respect to these 'omissions' it need only be said that they were utterly irrelevant to the critical issue of 'voluntariness'."

More glaring is the conflict of the decision below with other circuits when compared with the Second Circuit's decision in *Monaco v. Dulles*, 210 F. 2d 760 (CA 2 1954), where the plaintiff not only committed "sins of omission" but actually "ignored the warning of the State Department, made in response to Italian laws of dual nationality, to secure permission to enter Italy without liability for military service." (210 F. 2d at 761.)

And see *Pandolfo v. Acheson*, 202 F. 2d 38 (CA 2 1953), where the Second Circuit, on the authority of this Court's decision in *Mandoli v. Acheson*, 344 U.S. 133, rejected the argument, inherent in the decision below, that the failure of the plaintiff to remove himself from the jurisdiction of the Italian authorities rendered his conduct voluntary.

To the same effect, rejecting the argument that failure to get out of the military service renders the conduct voluntary, is the District of Columbia Court's decision in *Soccodato v. Dulles*, 220 F. 2d 243, 245 (CA DC 1955), relying, incidentally, upon the Third Circuit's opinion in *Perri v. Dulles*, 206 F. 2d 580, 589.

E.

As to Whether the Statute Should Be Construed so as to Make Expatriating Conduct Which Is in Obedience to the Laws of a Foreign Country by One Present in That Country.

By refusing to construe 8 USC 801(c) so as not to apply to the facts of this case, the court below is again in conflict with the Third Circuit's decision in *Lehmann v. Acheson*, 206 F. 2d 502 (CA 3 1953), where that court after quoting from this court's decision in *Kawakita v. United States*, 343 U. S. 717, 723, 725, said (206 F. 2d at 508):

> "Lehmann's actions were certainly within the periphery of the principles stated. As a Swiss citizen he was required to submit to its conscription laws and that apart from the factor that he would have been subjected to punishment had he done otherwise. We can see nothing in the record which would possibly justify a finding that Lehmann did aught but what was obligatory upon him by virtue of his dual citizenship under the laws of Switzerland . . ."

F.

As to Whether 8 USC 801(c) Is Unconstitutional.

The court below sustained the constitutionality of the section in one paragraph [R. 75], citing three of its own cases[10] and this Court's decision in *Mackenzie v. Hare*, 239 U. S. 299.[11] The court's statement that "the many cases from other circuits, cited above, which have considered expatriation under §401(c) have assumed that it is con-

[10] In none of which was the issue discussed or reasoned, but simply disposed of by single sentence statements.

[11] The inappositeness of this decision will be discussed below.

stitutional," is a *non sequitur*. In the cases to which the court had reference (*Pandolfo, Alata, Miaonza*) there was no occasion for those courts to consider the question of constitutionality for they all held in favor of the citizen on other grounds.

The decision of the court below sustaining the constitutionality of the section is in conflict with the reasoning of the First Circuit in *Dos Reis ex rel. Camara v. Nicolls*, 161 F. 2d 860, 862, 863 (CCA 1 1947), where the court, by dictum to be sure, said:

> "It is by no means clear that Congress would have the power to deprive a native born American citizen of his nationality under the circumstances here presented."

After which it explained its reasons for that opinion.[12]

G.

As to Whether the Finding by the Trial Court, Approved by the Court Below, That Petitioner's Military Service Was Voluntary, Is Clearly Erroneous Within the Meaning of Rule 52(a), Federal Rules of Civil Procedure.

What the court meant by its statement [R. 73] that the trial court was entitled "to find the facts were otherwise than stated by the plaintiff" is not clear. The only substantial finding of fact which is contrary to what plaintiff testified is the ultimate finding [VIII, R. 12] that "plaintiff's entry and service in the Japanese Armed

[12] The First Circuit avoided deciding the constitutional issue, in accordance with the well known rule, by holding, what is now the accepted law, that the conduct must be voluntary and that such was not the fact in that case, hence there was no loss of citizenship

Forces was his free and voluntary act."[18] As to the other findings referred to by the court [R. 5, 6] (save Finding III; as to which see footnote 16) these were all in accordance with plaintiff's testimony, which the trial court believed, and which, improperly as we have seen above under Point I, D, it used to sustain its ultimate finding of voluntary conduct.

Not only is the ruling of the court below on this ultimate finding in conflict with the Third Circuit's decision in *Stipa v. Dulles*, 233 F. 2d 351, 353 (CA 3 1956), which held that such a finding is but an inference from other facts and "as such is subject to review free of the restraining impact of the so-called 'clearly erroneous' rule applicable to ordinary findings of fact by the trial court," but it is also in conflict with the decision of the District of Columbia in *Soccodato v. Dulles*, 226 F. 2d 243, 247 (CA DC 1955), where on substantially the same facts that court held the finding to be clearly erroneous within the meaning of Rule 52(a).

---

[18]Finding VII, R. 12, is the same finding, only stated negatively. The only other finding contrary to the record is the irrelevant one [R. 25, Finding No. III (*See Mañiago v. Dulles*, 210 F. 2d 760, 761 (CA 2 1954))], that when plaintiff went to Japan in 1939 he knew he was likely to be called for military service in the Japanese Armed Forces. Though not articulated, this finding, by the trial court, apparently approved by the court below [R. 70], assumes, with absolutely no evidence to support the assumption, that unlike other Americans, an American boy of Japanese parents, who visits the country where his parents were born, does so "to do his duty as a Japanese national." [R. 55.] This assumption is subject to the same infirmity as the presumption in the California Alien Land Law struck down by this Court in *Oyama v. California*, 332 U.S. 633.

Moreover, the ruling of the court below that the trial court had the right to supply evidence, which was not presented, contrary to that which was presented, apparently on the theory that the trial court did not believe the plaintiff [R. 70; R. 55][14] (although as to what facts the court did not believe is not clear), is contrary to that of the Third Circuit in *U.S. ex rel. Schachter v. Curran*, 4 F. 2d 356, 358 (CCA 3 1925), where the court approved Judge Hand's statement that:

> "It is not enough for the Board of Special Inquiry to say that they do not believe. . . . They have no power to dispense with the usual means of ascertaining the truth."

The statement of the court below [R. 73] that the trial court's supplying of the fact (that the military service was voluntary) was "by clear and convincing proof, if need be," is without support. The trial court's finding on this ultimate fact was based entirely upon the erroneous theory of "omissions," as discussed above. (The Government presented *no* evidence, but rested immediately at the conclusion of plaintiff's case [R. 49, 50].) Such can scarcely be said to arise to the level of the clear, convincing, unambiguous *proof* required of the Government in cases such as this.

---

[14] Cf. as to this phase, the similarity of this case with *Gonzales v. Landon*, 350 U.S. 920 [R. 33 in that case]: "I don't know how such foolish statements can be made."

II.

The Decision of the Court Below Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Decided by This Court.

At least thrice within the last few years has this Court considered cases involving the constitutionality of subsections of Section 401 of the Nationality Act of 1940. Two of the cases (*Acheson v. Okimura*, 342 U.S. 806, and *Acheson v. Murata*, 342 U.S. 900) involved the very subsection, (c), involved in this case.[18] The third (*Gonzales v. Landon*, 350 U.S. 920) involved subsection (j). In all three cases this court did not decide the constitutional question.

The *Okimura* and *Murata* cases were direct appeals (under 28 USC 1252) by the Government from decisions of the District Court for the District of Hawaii holding subsections (c) and (e) unconstitutional (*Okimura v. Acheson*, 99 F. Supp. 587; *Murata v. Acheson*, 99 F. Supp. 591). This Court,[19] without deciding the constitutional question (which was the very basis for the appeals) remanded the cases for findings as to the circumstances attending appellees' service in the Japanese Army (and

[18]Murata also involved subsection (e).

[19]Mr. Justice Black being of the opinion that the judgments should be affirmed and Mr. Justice Douglas being of the view that the findings were adequate to show that the conduct was under compulsion.

voting in Japanese elections) and the reasonable inferences to be drawn therefrom.[17]

In the *Gonzales* case, this court reversed the court below because of the failure of the Government to meet the standard of proof required of it in such cases, and again did not reach the constitutional questions.

We submit that the same impelling reasons which induced the court to grant certiorari in the *Gonzales* case and to consider the appeals in the *Okimura* and *Murata* cases are present here and that the importance of the question calls for decision by this Court. This is true not only as to the constitutional question, but also as to the problem of the correct interpretation to be given the statute.

Moreover, the question is important not only from the standpoint of subsection (c) alone but because the idea of compulsory loss of citizenship, for the doing of this or that act, looms large in our national thinking and conscience. Although Congress passed R. S. 1999 in 1868 (15 Stat. 223; now covered by 8 USC 1482 and 1483) recognizing the *right* of a citizen who so desired to expatriate himself, since that time Congress has passed

[17] On remand the trial court made the required findings, but still adhered to its view that the sections were unconstitutional (111 F. Supp. 303, 111 F. Supp. 306). It held to the same effect in six later cases: *Terada v. Dulles*, 121 F. Supp. 6; *Uesu v. Dulles*, No. 1251; *Kikkawa v. Dulles*, No. 1250; *Hisamoto v. Dulles*, No. 1318; *Tamaya v. Dulles*, [illegible]3 and *Igarashi v. Dulles*, No. 1240 (the latter holding Sec. 401(d) also invalid). The Government prosecuted appeals in none of these cases.

more and more legislation setting forth ever increasing instances for "compulsory expatriation"[18] whether the native-born citizen desires the same or not. (See "The Expatriation Act of 1954," 64 Yale L. Jl. 1164, 1171 *et seq.* 8 USC 1481, 1482.) The instant case, therefore, represents the plight of not merely one person, nor even the many more who were caught under like circumstances,[19] but the case represents a problem which may and has touched the lives of thousands of American born citizens. The importance of the question merits hearing by this Court.

Furthermore, the constitutional questions presented are of the recurring serious type which call for the grant of certiorari by this Court. (*Wieman v. Updegraff*, 344 U.S. 183, 186.)[20]

---

[18]This contradictory phraseology is that of the Government's in its brief (pg. 49) before this Court in the *Gonzales* case, No. 121, Oct. Term, 1955.

[19]See *Kato v. Acheson*, 94 F. Supp. 415, 416 (DC SD Cal 1950).

[20]The court below has recently upheld the constitutionality of 8 USC 801(j). (*Perez v. Brownell*, 7 12 1956 No. 14,497, F. 2d . . 25 L. W. 2057.) Petition for writ of certiorari is being prepared in that case. Pending before that court is *Mendoza-Martinez v. Mackey and Brownell*, No. 14997, also involving the constitutionality of 8 USC 801(j). Counsel in that case filed a brief *amicus curiae* in this Court in *Gonzales v. Landon*. Pending before the Court of Appeals for the Second Circuit is *Trop v. Dulles*, No. . . . involving the constitutionality of 8 USC 801(g). (At the time of the writing of this petition no number had yet been assigned the *Trop* case.)

III.

The Court Below Has Decided Questions of Federal Law in Conflict With Applicable Decisions of This Court.

A.

The Decision Below Is in Conflict With This Court's Decision in Gonzales v. Landon, 350 U.S. 920, in Holding That the Standard of Proof Required in Cases Arising Under Section 401(c) of the Nationality Act of 1940 Is Different From That Required Under 401(j) and in the Denaturalization Cases.

The court below held [R. 74] first that there is a different standard of proof required under section 401(c) than under 401(j) and that therefore this Court's decision in *Gonzales v. Landon*, 350 U.S. 920, is not controlling. We submit there is no basis for the distinction. The court below has confused the element of intent with the element of voluntary conduct.

There was no question in the *Gonzales* case but that petitioner there did the act interdicted by 401(j)—remained outside the United States during time of war for the purpose of evading or avoiding military service [see R. 17-18, 20 in the *Gonzales* case]. But, on the factual issue, *Gonzales* successfully argued to this Court that on the issue of voluntariness the Government had not met the burden of proof required of it (see Petitioner's Opening Brief in *Gonzales*, pp. 26, 30-31). In this argument, as seen, this Court sustained petitioner.

In refusing, therefore, to follow the *Gonzales* case the court below decided a question of Federal law in conflict therewith.

The second reason given by the court below for not following this court's decision in *Gonzales* is that [R. 75]

by alleging in his complaint that he entered and served in the armed forces of Japan, petitioner has supplied the clear and convincing evidence required by the *Gonzales* case.

The error of this reasoning is at once apparent. It completely forgets that mere service in the armed forces of a foreign state is *not* expatriating.[21] That service *must* be voluntary. "Expatriation is the *voluntary* renunciation or abandonment of nationality or allegiance." *(Perkins v. Elg*, 307 U.S. 325, 334.) (Italics added.) See also, *Mandoli v. Acheson*, 344 U.S. 133, 135. Accordingly, absent proof of the very high degree required, and refusing to require it, the decision of the court below is in conflict with this Court's decision in *Gonzales*.

B.

The Decision Below Is in Conflict With Decisions of This Court Which Have Held That Conduct Under Compulsion of Law Is Not Voluntary.

As pointed out above when discussing the conflicting courts of appeals cases, the court below ruled [R. 73] that "there is no presumption that one who is conscripted into the armed forces enters involuntarily."

This view is in conflict with at least one decision of this Court and with the purport of others.

In *Mandoli v. Acheson*, 344 U.S. 133, 135, this Court accepted the Government's confession of error that "service in the Italian army by one similarly situated could only be regarded as having been taken under legal compulsion amounting to duress." . . . ."

---

[21] *Dos Reis ex rel. Camara v. Nicholls*, 161 F. 2d 849 (CCA 1 1947).

The acceptance by this Court of the confession of error, particularly in the light of the dissenting opinion, is of the utmost significance and must be taken as establishing the rule of law.[22] See *Lehmann v. Acheson*, 206 F. 2d 302, 308, 306, and *Isserlis v. Dulles*, 220 F. 2d 343, 346, 347, where the Second and Third Circuits so interpreted *Mandoli*.

In *Adams v. Maryland*, 347 U.S. 179, 181, in discussing the question as to whether one who testifies before a Senate investigating committee pursuant to subpoena, does so voluntarily, this Court said:

> "... He was not a volunteer. He was summoned. Had he not appeared he could have been fined and sent to jail."

See also *Oklahoma Packing Co. v. Holland*, 315 U.S. 357, 363, where this Court comments on the coercive nature of a subpoena. And compare *Kawakita v. United States*, 343 U.S. 717, 728, where this Court recognized the vast difference between one who is drafted and one who volunteers.

In *United States v. DiRe*, 332 U.S. 581, 594, this Court refused to penalize "failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law." While that case is concerned with the question of probable cause to make an arrest, the refusal of this Court to infer probable cause from failure to resist authority, was a recog-

---

[22] *Gibson v. United States*, 329 U.S. 338, 344, n. 9; *Young v. United States*, 315 U.S. 257, 258-259; *Hyde v. United States*, 315 U.S. 787 [refusal to accept the confession of error. Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951 Ed.) p. 166.]

nition by this Court as in its later cases, above cited, that submission to the force of law is not tantamount to voluntary action, but is under compulsion. . . .

C.

The Decision Below Is in Conflict With Decisions of This Court Which Held That Conduct Pursuant to Law by a United States Citizen in a Foreign Country of Which He Is Also a Citizen Should Not Be Held to Be Expatriating.

In *Kawakita v. United States*, 343 U.S. 717, 723, 725, this Court said:

> ". . . He (Kawakita) had a dual nationality, a status long recognized in the law . . . . The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other . . .
>
> "As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other . . . ."

This statement by the court in *Kawakita* takes on double importance when viewed in the light of the Government's argument to this Court where, with the shoe on the other foot, the Government (successfully, we might add) resisted a claim in a treason case that the petitioner had expatriated himself. In its Brief in Opposition in the *Kawakita* case, the Government said (pp. 11-12):

> ". . . the country of residence can force such a national to serve in its armed forces . . . . *Petitioner was unequivocally excused for conduct required of him by the laws of Japan.*" (Italics added.)

See also *Mandoli v. Acheson*, 344 U.S. 133, 138, holding that the law does not "require a citizen by nativity to elect between dual citizenship." Accord: *Yasui v. United States*, 320 U.S. 115, 117.

D.

If Section 401(c) Is Not Construed so as to Preclude Loss of Citizenship Under the Circumstances of This Case, It Is Unconstitutional in Violation of the Due Process Clause of the 5th Amendment and the Citizenship Clause of the 14th Amendment.

We do not make an extensive argument on this point here. The matter was briefed before this Court only last term in *Gonzales v. Landon*, 350 U.S. 920; No. 111, Oct. Term, 1955.

It will suffice at this point to say that the question is a grave and substantial one, calling for determination by this Court. We believe that the decision of the court below holding the section constitutional is contrary to the decision of this Court in *United States v. Wong Kim Ark*, 169 U.S. 649, 703,[24] to the decision of this Court in *Osborn v. Bank of the United States*, 9 Wheat. (U.S.) 738, 824,[25] and to the real meaning of this Court in *Mackenzie v. Hare*, 239 U.S. 299, 311.[26] We think the actual holding of the *Mackenzie* case is distinguishable and that if not, the case should be re-examined by this Court.

[24] "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."

[25] "the constitution does not authorize congress to enlarge or abridge those rights of a native citizen."

[26] "a change in citizenship cannot be arbitrarily imposed, that is imposed without the concurrence of the citizen."

IV.

The Decision of the Court Below Is Clearly Erroneous.

Gonzales v. Landon, 350 U.S. 920, demonstrates that where citizenship (certainly a basic Federal right) is involved, this Court will examine the facts to assure that there has not been an improper loss thereof. (Cf. *Baumgartner v. United States*, 322 U.S. 665; *Schneiderman v. United States*, 320 U.S. 118; *Oyama v. California*, 332 U.S. 633, 636; *Cassell v. Texas*, 339 U.S. 282, 283; *Niemetko v. Maryland*, 340 U.S. 268, 271.)

We suggest that the decision of the court below sanctioning the deprivation of citizenship based upon submission to law carrying penal sanctions and positing a finding of voluntary conduct on the "sins of omission" theory has resulted in a miscarriage of justice and hearing by this court should be granted to ascertain whether such a decision should be permitted to stand. Cf. McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 Harv. L. R. 5, 13.

Conclusion.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

A. L. Wirin,

Fred Okrand,

Attorneys for Petitioner.

APPENDIX A.

United States Court of Appeals for the Ninth Circuit.

Mitsugi Nishikawa, Appellant, vs. John Foster Dulles, as Secretary of State, Appellee. No. 14,742. June 18, 1956.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: CHAMBERS, Circuit Judge, and SOLOMON and HAMLIN, District Judges.

HAMLIN, District Judge:

This is an appeal from a judgment of the District Court decreeing that the appellant Nishikawa, who was born in the United States, lost his United States citizenship by entering and serving in the Armed Forces of Japan from March 1, 1941 to September 6, 1945, and denying appellant's prayer for judgment that he is a national of the United States.

The action was begun when Nishikawa filed a complaint for a judgment declaring that he was a national of the United States under §503 of the Nationality Act of 1940, 8 U.S.C.A. §903, 1946 Ed.[1] The complaint alleged that he was born in the United States on April 20, 1916 and that on August 15, 1939 he went to Japan for the purpose of education and experience in the engineering field and that his intention was to return to the United States. The complaint further alleged that on or about March 1, 1941, plaintiff was conscripted into the Japanese army and served in that army until August, 1945, and that his service in said army was due to the Japanese conscription

[1]This section was repealed by the Immigration and Nationality Act of 1952, and is now covered by 8 U.S.C.A. §1503.

law and was the result of coercion and was not the plaintiff's free and voluntary act. The defendant answered and admitted that the plaintiff had served in the Japanese army during the above dates at a time when the plaintiff was a national of Japan and denied that such service was not a free and voluntary act of the plaintiff, denied that it was the result of coercion and denied that it was due to the Japanese conscription law. The answer specifically alleged that such service was the free and voluntary act of the plaintiff.

On the trial of the matter the plaintiff was called as the first and only witness. He testified in substance as follows: Until he went to Japan in 1939 he had resided and gone to school in the United States, graduating from the University of California with a degree in engineering. His parents then resided in the United States and his father had registered him at the family register in Japan when he was born. He stated he intended to stay two to five years in Japan to visit and to study. When he went to Japan he knew that Japan was fighting in Manchuria. In Japan he started to study under a tutor in Japanese language. His father died in November 1939 and funds were not available and he found a job in an aircraft plant in Osaka. About June of 1940 he received a notice to report for his physical examination pursuant to army service and he was inducted into the Japanese army in March 1941. Between those dates he did not contact or attempt to contact any American or Japanese official, nor did he at any time protest his induction. At no time did he tell any Japanese or American official that he was a United States citizen. He had heard rumors that the Kempi Tai (Secret Police) beat up persons who attempted to avoid conscription, and a friend of his who worked

at the American embassy told him that the consulate could do nothing for dual nationals, such as he was. When asked if he believed the rumors about the Kempei Tai, he stated:

> "Well, at that time the Japanese government, Japanese army was coming into control of the Japanese government and even the high officials were killed in their homes. So I had no alternative. *But it might have been true.*" [Emphasis added.]

He testified that he knew nothing about the conscription of men in the army in the United States in September, 1940, or of conditions in the United States, and that he was not told of these matters in letters from home and they were not discussed among his United States citizen friends in Japan.

He testified, in part, as follows:

> Q. Now, you stated, did you not, Mr. Nishikawa, that in 1940 you received a notice to report for physical examination, is that correct?
>
> A. Yes, sir.
>
> * * *
>
> Q. Do you recall the approximate date?
>
> A. It was around June, 1940.
>
> Q. June of 1940. And you entered the Japanese army in March of 1941, is that correct?
>
> A. Yes, sir.
>
> Q. Now, between June of 1940 and March of 1941, did you go to the American Consulate and tell them that you did not want to serve in the Japanese army?
>
> * * *

The Witness: No, sir, because I talked to friends of mine and they mentioned the fact that the American Consulate couldn't do anything for dual citizenship of Japanese while in Japan.

Q. (By Mr. Dooley:) Between June of 1940, and March of 1941, did you tell any Japanese official that you were an American citizen?

* * *

The Witness: No, sir.

Q. (By Mr. Dooley:) Between June of 1940 and March of 1941, did you make any effort to renounce your Japanese nationality?

* * *

The Witness: No, sir.

* * *

Q. Did you read the newspapers between September 10th, 1940, and March of 1941?

A. No, sir.

Q. You didn't read any newspapers?

A. No, sir.

Q. Now, how far did you go in school before you went to Japan in 1939, Mr. Nishikawa?

A. I graduated from the University of California at Berkeley, sir.

Q. And you took up engineering, did you not?

A. Yes, sir.

* * *

Q. Now, when you received your notice to report to the Japanese army did you protest in any way your entrance in the Japanese army?

* * *

The Witness: No, I didn't.

Tr. pp. 26-30

* * *

Q. (By Mr. Manes): Now, you indicated under cross-examination, Mr. Nishikawa, that you did not protest against your induction into the army—

A. Yes.

Q. —and that you did not protest against the taking of a physical examination?

A. Yes, sir.

Tr. p. 37.

* * *

The Court: And in June, 1940, when you were told that you were to be drafted into the Japanese army, between June, 1940, and March, 1941—a period of almost a year—you didn't make any effort to find out whether an American citizen—you knew you were an American citizen?

The Witness: Yes, sir.

The Court: You didn't make any effort to find out whether an American citizen was required to go into the Japanese army. And the reason that you didn't make any effort was that you heard rumors that the Kempi Tai would beat you if they found that you didn't want to go into the army; is that your testimony?

The Witness: Yes, sir. Also, this nisei friend of mine that was employed in the embassy stated the fact that dual citizen niseis, the American Consulate couldn't do anything for the citizen nisei.

Tr. p. 47.

* * *

The Court: In other words, he told you that if you went to the officials of your own country, the United States—

The Witness: Yes.

The Court: —that the Japanese police would find out about it and they would beat you; right?

The Witness: Yes.

Tr. p. 49.

* * *

After argument by counsel, the Court made the following statement:

"Well, of course, the short answer to the entire argument, counsel, is that the Court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony." Tr. p. 55.

* * *

"I believe this: he went into the service because he wanted to go into the service. I believe he went to Japan, and I believe that he waited for them to call him to the service, because under the laws of Japan that's the manner in which they took their men into the service under the draft laws, the conscription laws." Tr. p. 56.

* * *

"* * * All I am saying is that he went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army. He went over there to serve his hitch in the army. He went over and waited until they reached him on the draft, and when they did he was drafted. And that is what he was there for. And his service could not be considered involuntary." Tr. p. 57.

The Court entered Findings of Fact in which the Court found that plaintiff went to Japan in August, 1939 at

twenty-three years of age, knowing at that time that he was likely to be called for military service in the Japanese Armed Forces; that he served in those armed forces from March, 1941 to September, 1945 while he was a national of Japan; that from the time he received his notice to report for physical examination in June, 1940 until March, 1941 when he was inducted, the plaintiff made no effort (1) to return to the United States; (2) to avoid entry or service in the Japanese Armed Forces; (3) to renounce his Japanese nationality; (4) to communicate or attempt to communicate, either with American officials in Japan, or with Japanese officials, with respect to the necessity or propriety of his entry and service in the Japanese Armed Forces. The Court further found that the service was not the result of coercion, and that it was the free and voluntary act of the plaintiff. On these Findings, he entered the Judgment from which this appeal is taken.

Appellant contends that some of the findings made by the lower court must be set aside, because (1) there is no positive evidence in the record to support them and they were expressly negatived by the plaintiff on the stand; (2) the proof of expatriation must be "clear, unequivocal and convincing"; and (3) the burden of proof of the voluntary nature of the expatriating act is on the one trying to show expatriation (here, the defendant) and the burden of proof is not on the plaintiff to show involuntariness.

Counsel for both parties agree that the act of expatriation must be a voluntary act on the part of the plaintiff in order to effect an expatriation. However, there is no requirement that he knew or intended that his act would result in an expatriation. Savorgnan v. United States, 338 U. S. 491 (1950). The ground of expatriation re-

lied on by the defendant in the present case is that contained in §401(c) of the Nationality Act of 1940, 8 U.S.C.A. §801(c), 1946 Ed. That section reads as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state."

That section is fortified by the presumption appearing in §402 of the same Act, 8 U.S.C.A. §802, 1946 Ed., which reads in part as follows:

> "A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection (c) or (d) of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state * * * and such presumption shall exist until overcome whether or not the individual has returned to the United States. * * *"

The crucial issue in this case is whether the entry of the plaintiff into the armed forces of Japan was a voluntary act on his part. In 1940 when this statute was enacted by Congress it was well known that many countries had

[3]Sections 802 and 801(c) were repealed by the Immigration and Nationality Act of 1952 and are now covered by 8 U.S.C.A. §§1482 and 1481(a)(3) respectively.

conscription laws. If Congress had intended to exclude the act of a dual national who entered the military service of a foreign country by means of the conscription laws from the expatriation provisions of the Act, it would have been very simple to so provide. The plaintiff contends that the burden of proof of voluntariness was on the defendant, while the defendant contends that the burden of proof was on the plaintiff to show involuntariness. The issue was expressly resolved in the case of Pandolfo v. Acheson, 2 Cir., 202 F. 2d 38, and the ruling there was followed by the Court of Appeals for the District of Columbia in Alata v. Dulles, 221 F. 2d 52, and appears to us to be the correct rule. In Alata v. Dulles, *supra*, at page 54, it is said:

> "The Secretary of State answers that since the evidence supports the finding that he took the expatriating oath the burden of offsetting its effect by showing it to have been involuntary was cast upon him and he failed to carry this burden.
>
> We agree with the Secretary's position as to where the burden lay. As held in *Pandolfo v. Acheson*, 2 Cir., 202 F. 2d 38, 40.
>
> "* * * The plaintiff has the burden of proving that he is a United States citizen. He made a *prima facie* case by alleging and proving his birth in New York. The Government then had the burden of showing that he had expatriated himself. This it did by proof of his oath of allegiance to the King of Italy. Presumptively this oath was voluntarily taken. He then had the burden of going forward with evidence to establish that it was taken under duress.'"

This rule if applied here would cast the burden upon the plaintiff to show that his entry into the armed forces was involuntary. There is no presumption that one who is conscripted into the armed forces enters involuntarily, and all the circumstances must be looked at to resolve the question of involuntariness. Acheson v. Maenza, D. C. Cir., 202 F. 2d 453, 459; Mata v. Dulles, *supra*, see 15 A. L. R. 2d 550 and 1956 Supp. In Mata v. Dulles, *supra*, at page 55, the Court said:

> "We pointed out in *Acheson v. Maenza, supra*, that induction into an army under a conscription law is alone insufficient to establish involuntariness of service under the Nationality Act of 1940 * * *. But we also said, 'there must be consideration of the circumstances attending the service in the foreign army, and the reasonable inferences to be drawn therefrom. * * *.'"

The trier of fact need not accept the uncontradicted testimony of a witness who appears before it, and the demeanor of that witness may be such as to convince the trier that the truth lies directly opposed to the statements of the witness. NLRB v. Howell Chevrolet Co., 9 Cir., 204 F. 2d 79, 86, aff'd *sub. nom.* Howell Chevrolet Co. v. NLRB, 346 U. S. 482; Chow Sing v. Brownell, 9 Cir., 217 F. 2d 140, 143; Lew Wah Fook v. Brownell, 9 Cir., 218 F. 2d 924; Mar Gong v. Brownell, 9 Cir., 209 F. 2d 448, 449, 450; Wigmore on Evidence, Third Ed., Vol. VII, §2034 n. 3; Zimmer v. Acheson, 10 Cir., 191 F. 2d 209, 212. This rule is particularly true where the witness is interested in the outcome of the case, or where his testimony is improbable or contains patent omissions and inconsistencies. Quock Ting v. United States, 140 U. S.

417, 420; Zimmer v. Acheson, *supra*. We think that the testimony of the plaintiff in the present case, as revealed in the record and summarized and set out above in part, clearly brings it within this rule, and entitled the Court to find that the fact were otherwise than stated by the plaintiff, and by clear and convincing proof, if need be. Under no circumstances can it be said that they are "clearly erroneous" within the meaning of Rule 52(a) of the Rules of Civil Procedure, and hence they cannot be set aside by this Court.

The Court was not required to believe that appellant was himself the victim of terror conditions in Japan. In discussing a similar contention in this Court in Coumas v. Brownell, 9 Cir., 222 F. 2d 331, 1955, Chief Judge said:

> "Coumas first contends that since expatriation must be caused by his 'voluntary' act, *Perkins v. Elg*, 307 U. S. 325, 334, 59 S. Ct. 884, 83 L. Ed. 1320, his entry into the Greek army was involuntary because he was *inducted* into it. It nowhere appears that he protested his induction, and he voluntarily went to Greece presumably knowing that under the Greek law he, a Greek citizen, might be conscripted into the army. Cf. *Dos Reis ex rel. Camara v. Nicolls*, 1 Cir., 161 F. 2d 860."

This language is particularly descriptive of the facts in the instant case.

Neither the facts found by the District Court nor the inferences from those facts can be set aside by this Court unless "clearly erroneous." The record here amply supports the conclusion of the lower court, that the act of the plaintiff in entering the Japanese army was a voluntary act.

Appellant further complains of the refusal of the lower court to admit in evidence the passport application of appellant. There appears to be no error in this ruling. In any event the appellant testified upon the trial to all of the important facts which appeared in the passport application.

It is further contended that the recent decision in Gonzales v. Landon, 350 U. S. 920, means that this case should be reversed, inasmuch as the Court there said that proof of expatriation must be by "clear and convincing" evidence, and that this was not done here. We do not agree. First, the Gonzales case only dealt with §401(j) of the 1940 Act which provides that a person expatriates himself when he remains out of the country "for the purpose of avoiding service in the armed forces of the United States." This ground of expatriation, unlike the one in issue here, requires a mental element in the expatriating act itself. This is all the more clear by the fact that the cases cited by the Supreme Court for its authority dealt also with conduct requiring a certain mental element. Baumgartner v. U. S., 322 U. S. 665, 1943; Schneiderman v. U. S., 320 U. S. 118, 1942. Secondly, the fact that appellant here performed the act that is proscribed by §401(c), to-wit, entering and serving in the armed forces of Japan, was established by clear and convincing evidence—in fact, it was pleaded by plaintiff in his complaint and admitted in the answer.

Appellant further contends that §401(c) of the 1940 Act which is here under consideration, is unconstitutional. This Court has already held other sections of the same Act providing for expatriation to be constitutional. As to §401(j), Vidales v. Brownell, 9 Cir., 217 F. 2d 136, 138; Gonzales v. Landon, 9 Cir., 215 F. 2d 955, rev'd on

other grounds, 350 U. S. 920; as to §401(e), Miranda v. Clark, 9 Cir., 180 F. 2d 257. There is nothing in these previous holdings of this Court to indicate that the same result should not be reached as to §401(e). Moreover, the many cases from other circuits, cited above, which have considered expatriation under §401(e) have assumed that it is constitutional. Appellant asserts that all persons born in the United States are citizens by virtue of the Constitution and that Congress is powerless to enact laws which will deprive a native born American of his citizenship absent a voluntary renunciation by such person. That Congress has such power was established in Mackenzie v. Hare, 239 U. S. 299. In our view, the claim of unconstitutionality lacks merit.

The judgment of the District Court is affirmed.

(Endorsed:) Opinion. Filed Jun. 18, 1956.

Paul P. O'Brien, Clerk.

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Mitsugi Nishikawa, Appellant, vs. John Foster Dulles, as Secretary of State, Appellee. No. 14742.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came onto be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On consideration whereof it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(ENDORSED)

Filed and entered June 18, 1956.

PAUL P. O'BRIEN,
Clerk.